Supreme Court, U.S.
FILED
OCT 10 1986
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-284

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MARGUERITE COOPER, ET AL.,

CROSS-PETITIONERS

V.

GEORGE P. SHULTZ, SECRETARY OF STATE

SUPPLEMENTAL BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRUCE J. TERRIS
ELLEN KABCENELL WAYNE
(Counsel of Record)
KAREN H. EDGECOMBE
Terris, Edgecombe, Hecker & Wayne
1121 12th Street, N.W.
Washington, D.C. 20005
(202) 682-2100

October 10, 1986

#124

TABLE OF AUTHORITIES

Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984), certiorari denied, 105 S. Ct. 3488 (1985).....3

Library of Congress v. Shaw, 54 U.S.L.W. 4951 (July 1, 1986).....2,3

Shultz v. Palmer, No. 86-86 (July 21, 1986), petition for certiorari.....3

No. 86-284

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1986

MARGUERITE COOPER, ET AL.,

CROSS-PETITIONERS

V.

GEORGE P. SHULTZ, SECRETARY OF STATE

SUPPLEMENTAL BRIEF IN SUPPORT OF CROSS-PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

In connection with their Cross-Petition for a Writ of Certiorari, cross-petitioners hereby notify the Court of an additional decision of the Court of Appeals for the District of Columbia Circuit in a related portion of this case.

As described more fully in our Brief in Opposition to the Petition for a Writ of Certiorari ("Br. Opp."), pp. 6-8, the district court's fee award in this case

was made up of three separate orders. The first order awarded fees for the uncontested hours at cross-petitioners' counsel's historic billing rates. This amount was summarily affirmed by the court of appeals and subsequently paid by cross-respondents. The second order represented the difference between counsel's historic and current billing rates for the uncontested hours. This Court vacated that judgment in light of its decision in Library of Congress v. Shaw, 54 U.S.L.W. 4951 (July 1, 1986), and remanded to the court of appeals. The third order, which consisted of the district court's award of quality and contingency adjustments to the attorneys' fees lodestar for work on the merits of the case, is currently before this court

on both a petition (No. 86-86) and a cross-petition for a writ of certiorari.

On August 25, 1986, the court of appeals issued a judgment and memorandum opinion in the second portion of this case (attached as an appendix hereto). It vacated the judgment of the district court "for further consideration consistent with Library of Congress v. Shaw, supra; Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 24-25 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 3488 (1985); and the Supreme Court's eventual disposition of the petition for certiorari, filed July 21, 1986, in Shultz v. Palmer (No. 86-86)." App. 2a-3a. In its Memorandum Opinion, the court of appeals provided guidance for the district court on remand (App. 7a-8a):

> To guide the district court, we point out that under Shaw coupled with Laffey, "the [historic] rates customarily charged by a firm . . . presumptively stand as the reasonable rates." Laffey, 746 F.2d at 15 * * *. However, the Laffey opinion did acknowledge the possibility of overcoming the presumption in favor of the particular firm's customary billing rates, if those rates are shown to be abnormally low.

In addition, the terms of the court of appeals' remand explicitly include consideration of this Court's disposition of the pending petition for certiorari. The court of appeals stated, "Until the Supreme Court acts on the pending petition, the matter of fees payable in this aging case cannot be settled in court conclusively." App. 6a-7a.

In our Cross-Petition for a Writ of Certiorari we contended that if this Court grants the government's Petition

that all the issues in this case can be considered together. The recent determination of the court of appeals is consistent with, and supports, this position. On the other hand, the court of appeals' opinion provides no further reason to grant the government's petition.

Respectfully submitted,

BRUCE J. TERRIS
ELLEN KABCENELL WAYNE
KAREN H. EDGECOMBE
Terris, Edgecombe,
Hecker & Wayne
1121 12th Street, N.W.
Washington, DC 20005
(202) 682-2100

October 10, 1986

#124.0

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 84-5815

ALISON PALMER

V.

GEORGE P. SHULTZ

And Consolidated Case No. 84-5816

[Filed Aug. 25, 1986]

BEFORE: EDWARDS, GINSBURG and SCALIA, Circuit Judges.

JUDGMENT

Upon consideration of the Supreme Court's vacation of a portion of this Court's February 11, 1985 order, Shultz v. Palmer, 54 U.S.L.W. 3866 (U.S. July 7,

1986), and the Supreme Court's remand for further consideration in light of Library of Congress v. Shaw, 54 U.S.L.W. 4951 (U.S. July 1, 1986), and taking into account the statements filed by the parties pursuant to this Court's July 23, 1986 order, it is

ORDERED, for the reasons stated in the accompanying memorandum, as follows:

1. The District court's November 7, 1984 judgment in the amount of $38,222.81 is vacated.

2. The matter is remanded to the District court for further consideration consistent with Library of Congress v. Shaw, supra; Laffey v. Northwest Airlines, Inc., 746 F.2d 4, 24-25 (D.C. Cir. 1984), cert. denied, 105 S. Ct. 3488 (1985); and the Supreme Court's eventual disposition of the petition for certio-

rari, filed July 21, 1986, in Shultz v. Palmer (No. 86-86).

The Clerk is directed to transmit a certified copy of this judgment to the District Court in lieu of formal mandate.

Per Curiam

FOR THE COURT:
GEORGE A.FISHER, CLERK

/s/ Robert A. Bonner
Chief Deputy Clerk

No. 84-5815, Alison Palmer v. George P. Shultz

MEMORANDUM

On November 7, 1984, the district court entered two judgments in this case, one in the amount of $219,439.40, and the other for $38,222.81. The first judgment, which was based on "historic" rates charged by appellees' attorneys when the work was actually performed, was uncontested. The second judgment granted appellees an additional sum, $38,222.81, which represented the difference between their attorneys' fees calculated at historic rates and those fees calculated at the higher rate in effect when the fee application was filed.

Both sides now recognize that the $38,222.81 judgment must be vacated. The Supreme Court's decision in Library of

Congress v. Shaw, 54 U.S.L.W. 4951 (U.S. July 1, 1986), makes it clear that any compensation for delay in payment is functionally equivalent to interest, from which the United States is immune absent specific congressional consent. Id. at 4954-4955. Because, as both parties agree, the use of current rates affords compensation for delay in payment, Shaw requires the vacation of this second judgment.

There remains, however, a further judgment in this case. On December 21, 1984, the district court made a final award of fees and expenses to appellees. On March 24, 1986, we affirmed that judgment, describing it as a "conscientious[] endeavor[] to apply the law as declared in Laffey v. Northwest Airlines, Inc., 746 F.2d 4 (D.C. Cir. 1984)." We

questioned "whether the 'enhancements' made [in the final award] for quality and contingency fit the case law as it is evolving." "[O]ur doubts on that score," we stated, were "offset by appreciation that, in this particular case, the firm's own rate may have fallen below the rate brackets indicated by the charges of other firms for similar work in this community. See Laffey, 746 F.2d at 24-25."

The government has informed us that, on July 21, 1986, it petitioned for a writ of certiorari from this court's March 24, 1986 judgment; the petition challenges the district court's enhancement awards for quality of representation and risk of litigation. Until the Supreme Court acts on the pending petition, the matter of fees payable in this

aging case cannot be settled in court conclusively.

Accordingly, we vacate the district court's November 7, 1984, $38,222.81 judgment and remand the matter to that court for further consideration in light of Library of Congress v. Shaw, supra; Laffey, 746 F.2d at 24-25; and the Supreme Court's eventual disposition of the pending petition for certiorari.

To guide the district court, we point out that under Shaw coupled with Laffey, "the [historic] rates customarily charged by a firm . . . presumptively stand as the reasonable rates." Laffey, 746 F.2d at 15; see id. at 24 ("In almost every case, the firms' established billing rates will provide fair compensation.") (emphasis in original). However, the Laffey opinion did acknowledge the

possibility of overcoming the presumption in favor of the particular firm's customary billing rates, if those rates are shown to be abnormally low.

The fee applicant bears the burden of establishing that the particular firm's historic rates are below the broad range of those prevailing in the community during the same time period for similar work. Laffey, 746 F.2d at 19, 25. Only if the firm's rates fall below the community's rate brackets for the services in question will an upward adjustment be in order. Id.